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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL BENJAMIN RAFFERTY,

Defendant and Appellant.

C058859

(Super. Ct. No.
07F2156)

Defendant Michael Benjamin Rafferty entered a plea of no contest to three felonies and three misdemeanors, on condition that he be allowed to move to strike a prior strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The trial court denied the motion, then sentenced defendant to a total prison term of 11 years and eight months. Defendant contends the trial court abused its discretion by denying his *Romero* motion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Facts

In light of defendant's plea, we take the facts from the probation report.

Defendant telephoned the Anderson Police Department around 2:15 a.m. on March 13, 2007, to report hearing someone stealing a front-end loader tractor from a rock yard. He gave the location of the yard, but refused to give any further information.

A Shasta County sheriff's deputy, dispatched on the call, arrived at Salinas and Sons Construction around 3:00 a.m. The deputy saw two large sections of a chain-link fence lying on the ground near the entrance to the construction yard. It looked to her as though something large had rammed the fence. The deputy learned from the business's owner that a front-end loader, which had been inside the business's locked and fenced yard as of March 12, 2007, was missing. The owner also said he had an employee named "Mikey" who lived nearby in an abandoned shack or barn.

Deputies found the loader smashed into the northeast corner of a nearby Sikh Temple. Defendant, known as "Mikey," was brought to the scene, having been arrested for being under the influence of a controlled substance. He admitted driving the loader into the building because it was owned by foreigners, whom he believed to be Arabs, who did not believe in Jesus and did not belong there. He also admitted having injected methamphetamine that evening and using the drug regularly.

Procedure

Defendant was accused by information of unlawful driving or taking of a vehicle, a felony (Veh. Code, § 10851, subd. (a); count 1); vandalism in an amount of \$400 and more, a felony (Pen. Code, § 594, subd. (b)(1); counts 2 & 4);¹ damaging property to violate civil rights, a misdemeanor (§ 422.6, subd. (b); count 3); being under the influence of a controlled substance, a misdemeanor (Health & Saf. Code, § 11550, subd. (a); count 5); and driving on a license suspended for a prior driving under the influence conviction, a misdemeanor (Veh. Code, § 14601.2, subd. (a); count 6). As to counts 1, 2 and 4, the information alleged that defendant had a prior strike conviction in 1988 for assault with a firearm (§§ 245, subd. (a)(2), 1170.12); had served a prior prison term for evading a peace officer with disregard for public safety (§ 667.5, subd. (b); Veh. Code, § 2800.2, subd. (a)); and committed the present offenses while on release from custody in three separate pending cases (§ 12202.1). As to count 2, the information also alleged that defendant committed the offense in violation of section 422.75, subd. (a) (hate crime). Finally, as to count 6, the information alleged that defendant had a prior conviction for the same offense in 2006.

Defendant pleaded no contest to all charges under *People v. West* (1970) 3 Cal.3d 595 and admitted the alleged enhancements;

¹ All further undesignated statutory references are to the Penal Code.

his other pending cases were dismissed with *Harvey*² waivers. The plea agreement specified a 12-year lid, but permitted defendant to file a *Romero* motion.

Defendant's *Romero* motion argued: (1) his strike (assault with a firearm) was 20 years old, and the alleged victims had raped defendant's sister; (2) his last felony conviction was over 10 years ago; from 1997 to 2006 he had only a single misdemeanor conviction; and (3) his recent spate of arrests, and most of his other crimes, were the result of drug use. At the hearing on the motion, counsel asserted that aside from the strike defendant's record did not include crimes of violence.

Counsel presented evidence at the hearing that defendant had been provisionally accepted into a drug treatment program. Counsel also offered reports from three mental health professionals, who opined that defendant's present offenses could have stemmed from methamphetamine-induced psychosis.

Defendant's ex-sister-in-law testified that his drug problem developed after he went to prison for going after the two men who raped his sister. When not on drugs he was a normal person who loved his family. A drug treatment program would benefit him.³

² *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

³ On cross-examination she admitted that she had often tried to persuade him to get treatment and he had never done so. She also admitted that she was unaware of his criminal record aside from the 1988 assault.

Defendant testified that he had used methamphetamine from the age of 17, but had never gone into a residential treatment program because they are hard to get into; he thought the programs he had now applied to would help him because they are structured. (He had gone through the California Rehabilitation Center in 1995, but had taken drugs while in the program.) He committed the present crimes in a state of methamphetamine-induced paranoia, hearing voices and thinking "things were trying to get me."⁴ Twenty years ago, after his sister told him that two brothers had raped her, he went to their house with another person (his future brother-in-law), who shot at it but did not hurt anyone; he himself did not fire a shot.⁵ He had maintained various laboring jobs over the years since his original incarceration. He admitted incurring a domestic battery conviction and burglary convictions.

The trial court denied the motion, finding: (1) both defendant's current offense and his prior strike were "very serious" offenses; (2) although his strike was 20 years old, he

⁴ He admitted on cross-examination that the voices did not tell him to take a front-loader and ram it into the Sikh Temple, or to report to the police afterward that someone had stolen the front-loader. He did not remember telling the police that he thought the Sikhs were foreigners or Arabs who did not believe in Jesus.

⁵ He admitted that he knew before going over to the alleged offenders' house that the police were already investigating the case. He and his future brother-in-law went over there anyway, armed with a deer rifle, hoping to get them to come out of the house so that he could beat them up.

had a "nonstop criminal record" predating that offense and continuing up to the present, including both theft offenses and violent offenses. He had four additional felony convictions over the 20 years since his strike. He had also acquired four separate felony cases in 2006 and 2007, including car theft, possession of methamphetamine and false impersonation; although three of those were dismissed under his plea, his *Harvey* waivers allowed the court to consider them in sentencing; and (3) he had continually violated probation and parole. In short, he was exactly the type of repeat felon for whom the "Three Strikes" law was designed.

The trial court sentenced defendant to a total prison term of 11 years and eight months, consisting of six years (the upper term, doubled under Three Strikes) on count 2; 16 months (one-third the middle term, doubled) on count 1, consecutive; 16 months (one-third the middle term, doubled) on count 4, consecutive; two years consecutive for the hate crime enhancement; and one year consecutive for the prior prison term enhancement. The court ran sentence on the misdemeanor counts (3, 5 & 6) concurrent with the other sentences.

DISCUSSION

Defendant contends the trial court abused its discretion by denying his *Romero* motion because his prior strike is "mitigated," the present offenses are nonviolent and have "mitigating circumstances," and defendant has "excellent prospects." We are not persuaded.

A trial court may properly exercise its discretion to strike a defendant's prior strike or strikes only if it finds that "in light of the nature and circumstances of his prior felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

In reviewing a *Romero* decision, we will not reverse for abuse of discretion unless the defendant shows the decision was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Reversal is justified where the trial court was unaware of its discretion to strike a prior strike, or refused to do so at least in part for impermissible reasons. (*Id.* at p. 378.) But where the trial court, aware of its discretion, "balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance" [citation]." (*Ibid.*)

Here, the trial court was plainly aware of its discretion, balanced the relevant facts, and did not give any impermissible reasons for its decision. It considered only "the nature and circumstances of the defendant's present felonies and prior [felony offenses], and the particulars of his background,

character, and prospects" (*Williams, supra*, 17 Cal.4th at p. 161) to reach its conclusion that defendant, an inveterate offender over a period of more than two decades, did not fall outside the spirit of the Three Strikes scheme.

After reciting the evidence presented on the motion in the light most favorable to himself, defendant asserts that the trial court's contrary finding was irrational. Not so. More than a selective recitation of the record is necessary to demonstrate a reversible abuse of discretion by a trial court. (*Carmony, supra*, 33 Cal.4th at pp. 377-378.)

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

SCOTLAND, P. J.

SIMS, J.